Supreme Court
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Old Vail Partners,

Petitioner,

v.

County of Riverside; City of Temecula,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of *Younger v. Harris*, *401 U.S. 37, 91 S.Ct. 746 (1971)*, rather than *Railroad Commission of Texas v. Pullman Co.*, *312 U.S. 496, 61 S.Ct. 643 (1941)*, to a California inverse condemnation litigant, filing concurrent state and federal actions, improperly forecloses, in violation of the Fifth Amendment to the U.S. Constitution, that litigant's access to the federal courts for the adjudication of a civil rights claim under 42 U.S.C. §§1983, 1985.

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Petitioner, Old Vail Partners (hereinafter "Old Vail"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on March 10, 1997.

OPINIONS BELOW

Neither the opinion of the District or Appellate Court is certified for publication.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered judgment against Old Vail on February 10, 1997. Old Vail filed a petition for rehearing on February 21, 1997. The Ninth Circuit Court of Appeals denied Old Vail's petition for rehearing on March 10, 1997. This Court has jurisdiction to review the judgment of the court of appeals pursuant to *28 U.S.C. §1254(1)*.

STATEMENT OF THE CASE

The Municipal Improvement Act of 1913 establishes the statutory framework for California municipal corporations to finance the construction of public improvements by authorizing the special assessment of improved property in direct proportion to the special benefit bestowed thereon by an increased infrastructure. In this regard, the special assessment differs substantially from a tax in that a tax can be levied "without reference to peculiar benefits to particular individuals or property." (*Fenton v. City of Delano (1984) 162 Cal.App.3d 400, 405, 208 Cal.Rptr. 486*; compare, *Harrison v. Board of Supervisors of City of San Mateo (1975) 44 Cal.App.3d 852, 857, 118 Cal.Rptr. 828* [recognizing that a mere "general benefit" inuring to the public as a whole will not justify a special assessment].)

In June of 1988, the County of Riverside adopted Resolution of Intention No. 88-139, pursuant to the Municipal Improvement Act of 1913,[1] to create Special Assessment District No. 159 (hereinafter "AD 159") for the purpose of financing public improvements under the Improvement Bond Act of 1915.

On July 8, 1988, the County filed a Notice of Assessment in the Official Records, thereby, creating liens against all real property located within AD 159 for the purpose of securing repayment of the municipal improvement bonds issued to the public. The liens constitute public record and have priority over all later recorded interests. If a property

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[1]California Streets and Highways Code §10000 et seq. All statutory references shall refer to the California code, unless specifically designated otherwise.

owner defaults on the assessments, the County, pursuant to the bond issuance agreement, will foreclose upon his property to satisfy the assessment deficiency.

The subject Property is located within AD 159 and, therefore, subject to special assessment. Payment of these assessments constitutes a substantial, continuous fiscal obligation well into the next century. In accordance with California law, however, these "Commercial" assessments properly reflect the County of Riverside's contemplated "Commercial" use of the Property. (see, *Dawson v. Town of Los Altos Hills (1976) 10 Cal.3d 676, 129 Cal.Rptr. 97.*)

On November 21, 1989, Old Vail, in direct reliance upon the then existing "Commercial" assessments and corresponding "Commercial" zoning ordinance, purchased a 39.8 Acre parcel.

On or about December 1, 1989, the City of Temecula incorporated as a city and, thereby, annexed the properties within AD 159 into its municipal boundaries. On or about November 7, 1993, the City of Temecula further adopted a General Plan designating Old Vail's Property as "Professional Office" use rather than "Commercial" use. "Professional Office" use is a substantially more restricted use than "Commercial" use.

The City of Temecula's down-zoning of the Property completely destroyed the economic viability of the Property by prohibiting the minimum land use necessary to satisfy the special assessments levied by the County of Riverside. Old Vail filed suit in the U.S. District Court for the Central District of California and Superior Court of the State of California for the County of Riverside alleging, inter

alia, a taking in violation of the United States and California Constitutions.

Jurisdiction of the U.S. District Court, Central District of California was proper under *42 U.S.C. §§1983, 1985*.

On or about October 17, 1994, Old Vail requested the U.S. District Court, Central District of California to abstain under *Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 642 (1941)*, via citation to *Furey v. City of Sacramento, 592 F.Supp. 463 (E.D. Cal. 1984)*.

On or about November 9, 1994, the federal district court dismissed Old Vail's complaint as: (1) barred by the Tax Injunction Act *(28 U.S.C. §1341)*; (2) failure to adequately allege a taking in violation of the Fifth Amendment; and (3) failure to state a claim upon which relief can be granted. *(FRCP 12(b)(6))*. Old Vail appealed.

On February 10, 1997, the United States Court of Appeals for the Ninth Circuit entered judgment vacating the judgment of the U.S. District Court and abstaining from jurisdiction under *Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)*. The United States Court of Appeals for the Ninth Circuit assumed subject matter jurisdiction for purposes of abstention. (See, *United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996)*.)

On February 21, 1997, Old Vail filed a petition for rehearing with the Ninth Circuit Court of Appeals requesting the Court to abstain under *Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 642 (1941)* rather than *Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971)*.

On March 10, 1997, the Ninth Circuit Court of Appeals denied Old Vail's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW.

This case raises the significant issue of whether Younger abstention effectively forecloses a California inverse condemnation litigant from ever having its takings claims adjudicated within a federal forum. (*Younger v. Harris, 401 U.S. 37, 91 S.Ct. 1911 (1971)*; see also, *Beltran v. California, 871 F.2d 777, 782-83 (9th Cir. 1989).*)

The preclusionary effects of Younger abstention in the inverse condemnation arena necessarily arise from the interrelationship between the ripeness requirements of *42 U.S.C. §1983* and the California statutes of limitations soverning with inverse condemnation claims. To illustrate, the Ninth Circuit has held that a property owner must first exhaust his state inverse condemnation remedies prior to

instituting an action in federal court. (*Jones Intercable v. City of Chula Vista, 80 F.3d at 324 (9th Cir. 1996)* [observing that a California plaintiff's federal takings claim will not ripen until the party has first sought compensation through California's inverse condemnation proceedings].) California legislators, on the other hand, have determined that inverse condemnation claims shall be governed by all applicable California statutes of limitations. *(Government Code §945.8.)*

Old Vail must file its complaint within the prescribed statutory period. (See, e.g., *Government Code §65009(c)* [90 day statute of limitations pertaining action on a general plan].) Old Vail must, therefore, file a complaint in both state and federal court if it desires to preserve separate forums for the adjudication of distinct constitutional rights.

The application of Younger abstention to a California inverse condemnation litigant effectively precludes it from preserving separate forums for the adjudication of distinct constitutional claims by requiring the litigant to either: (1) file a single complaint in the state court, thereby abandoning its right to a federal forum, via the lapsing of the statute of limitations; or (2) file a complaint in both state and federal court, thereby evoking the prescripts of *Younger*. (*Beltran v. California, 871 F.2d at 782-83.*) Under either alternative, a California inverse condemnation litigant cannot satisfy the requisite conditions necessary to maintain an inverse condemnation action within a federal forum. (See e.g., *Furey v. City of Sacramento, 592 F.Supp. 463, 466 (E.D. Cal. 1984).*)

II. THE INVOCATION OF THE YOUNGER DOCTRINE CONFLICTS WITH PRECEDENT OF THE NINTH CIRCUIT.

The Ninth Circuit has in multiple land use/inverse condemnation cases approved a district court's decision to employ Pullman abstention. (*Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996; Bank of America Nat. T. & S. v. Summerland City Water Dist., 767 F.2d 544 (9th Cir. 1985); Pearl Investment Co. v. City and County of San Francisco, 774 F.2d 1460 (9th Cir. 1985); Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984); Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838 (9th Cir. 1979); Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978).*)

In *Furey v. City of Sacramento, 592 F.Supp. 463 (1984)*, plaintiff and other adjacent landowners signed a petition requesting the formation of a assessment

district in order to finance a sewer system. The City of Sacramento formed a special assessment district and installed a sewer system. The cost of the construction was allocated among the land owners in the district. After the assessment of Furey's property, the City of Sacramento rezoned Furey's property to Agriculture-Open Space, thereby effectively depriving Furey of any benefit of the sewer system. Furey filed a complaint in both state and federal court against the City of Sacramento for inverse condemnation.

The federal district court, by order of October 9, 1974, abstained under the Pullman doctrine pending a resolution of those claims raised in the Superior Court of California. (Id. 592 F.Supp. at 466.) Following resolution of Furey's state claims, the federal district court reassumed jurisdiction

and proceeded to adjudicate the merits of Furey's federal claims. (See, *Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986).*)[2]

In *Sinclair Oil Corp. v. County of Santa Barbara*, Sinclair Oil Corp. filed an action in state and federal court against the County of Santa Barbara alleging, inter alia, that the County's designation of its land as environmentally sensitive habitat effected a taking in violation of the California and U.S. Constitutions.

The district court dismissed four of Sinclair's five causes of action as unripe. The district court further dismissed the remaining claim, the petition for writ of mandate.

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[2]In accordance with Furey v. City of Sacramento, Old Vail filed both state and federal complaints.

The Ninth Circuit, overruled the district courts dismissal of Sinclair's petition for writ of mandate, holding that the district court should have refrained from addressing the claim under the reasoning of *Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941).*

It is proper to abstain under *Pullman* in order to prevent the forfeiture of a California inverse condemnation litigant's federal claims. To illustrate, the district court's invocation of Pullman abstention in *Furey* predated the U.S. Supreme Court *Pennzoil* and Ninth Circuit *Beltran* decisions. (See, *Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519, 48 U.S. 1 (1987).*) The Ninth Circuit *Furey* Court was, thus, not required to address the paradoxical dilemma created by the application of Younger abstention to inverse condemnation cases filed concurrently by

a single plaintiff in state and federal court. In *Sinclair*, by contrast, the Ninth Circuit was able to avert the adverse ramifications of *Younger* by reasoning that the previously filed state court action did not request damages or "just compensation". (*Sinclair Oil Corp. v. County of Santa Barbara*, *96 F.3d at 404 n.1.*)

The Ninth Circuit's prior precedent suggests that the application of *Younger* may be avoided by initially filing an inverse condemnation action only in federal court; thereby actuating Pullman abstention, rather than Younger abstention. (See, *Beltran v. State of California*, *871 F.2d at 782* [opining that the critical question is not whether the state proceedings are still ongoing, but whether the state proceedings were underway before

initiation of the federal proceedings][3].) The narrow statute of limitations pertaining to inverse condemnation actions, however, may continue to run while the action is pending in federal court. If the statute expires prior to the federal court abstaining under Pullman, the plaintiff will be barred from initiating his state court action.

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[3] In accordance with Beltran v. State of California, Old Vail filed its federal complaint prior to the state complaint. Both complaints, however, were filed on the same day.

III. THE BREADTH OF THE LANGUAGE EMPLOYED BY THE YOUNGER AND PULLMAN ABSTENTION DOCTRINES FACILITATES UNEQUAL TREATMENT OF SIMILARLY SITUATED INVERSE CONDEMNATION LITIGANTS.

The criteria for implementation of either Younger or Pullman abstention effectively authorizes the ad hoc and inconsistent employment of these abstention doctrines. To illustrate, Younger abstention is considered appropriate where "(1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." (*Fresh Int's Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986).*)

Pullman abstention, by contrast, is properly invoked where: (1) the complaint touches a sensitive area of

social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) the possible determinative issue of state law is doubtful. (*Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974).*)

The breadth of the language employed by these abstention doctrines renders the analysis thereunder interchangeable.

A. Abstention Under The Younger Doctrine Is Inapposite To Prior Holdings Of The Ninth Circuit.

The Ninth Circuit determined Younger abstention to be applicable to Old Vail based upon a finding that: (1) Appellant's parallel state action was filed on the same day as the federal

complaint and is currently on appeal, *Fresh Int's Corp. v. Agricultural Labor Relations Bd.*, *805 F.2d at 1358*; (2) "land use planning is a sensitive area of social policy," *Sinclair Oil Corp. V. County of Santa Barbara*, *96 F.3d at 409*, that implicates a "substantial" state interest, *Mission Oaks Mobile Home Park v. City of Hollister*, *989 F.2d 359, 361 (9th Cir. 1993)*; and (3) California state courts afford appellant "an adequate opportunity" to raise federal takings claims. (Id.)

The juristic rational employed by the Ninth Circuit to support its invocation of Younger abstention has been utilized to justify the implementation of Pullman abstention. For instance, in *Santa Fe Land Improvement Co. v. City of Chula Vista*, *596 F.2d 838 (9th Cir. 1979)*, owners of unimproved real estate originally purchased for industrial usage brought

an action for, inter alia, inverse condemnation against the City of Chula Vista for rezoning the real estate to marsh preserve. The trial court abstained from jurisdiction under the Burford doctrine; thereby dismissing the action without prejudice. (See, *Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943).*) The Ninth Circuit affirmed the decision to abstain but reversed the invocation of Burford abstention holding Pullman abstention to be appropriate.

The Ninth Circuit justified the evocation of the Pullman doctrine by finding: (1) "land-use planning is today a sensitive area of social policy" (quoting, *Rancho Palos Verdes v. City of Laguna Beach, 547 F.2d 1092, 1094-1095 (9th Cir. 1976)*; (2) there are state policies and questions which may obviate the need to reach the federal questions; (3) whether a city has abused its zoning

discretion "is by nature a question turning on the peculiar facts of each case" (*Sederquist v. City of Tiburon, 590 F.2d 278, 282 (9th Cir. 1978).*)

The legal and factual correlation between *Santa Fe Land Improvement Co.* and Old Vail necessitates a similar disposition of the cases. In both cases, the choice of abstention doctrine is critical to the continued viability of the litigants federal inverse condemnation claims. Moreover, in both *Santa Fe Land Improvement Co.* and Old Vail, the Ninth Circuit employed comparable legal logic, but arrived at antithetical conclusions. Intervention by the U.S. Supreme Court is, therefore, necessary to accurately articulate the standards for implementation of the federal abstention doctrines in order to prevent the disparate treatment of similarly situated inverse condemnation litigants.

B. Pullman Abstention Is Proper.

Old Vail's federal inverse condemnation claims satisfy the prerequisites necessary for invocation of Pullman Abstention. To demonstrate, Old Vail's complaint unequivocally touches and concerns a sensitive area of social policy. (*Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9th Cir. 1984)* ["land use planning is a sensitive area of social policy that meets the first requirement for Pullman abstention"]; see also, *Sinclair Oil Corp v. County of Santa Barbara, 93 F.3d at 409 [quoting Kollsman].*)

A definitive ruling on Old Vail's state issues may terminate the controversy. (*Sederquist v. City of Tiburon, 590 F.2d at 282.)* For instance, if the California courts provide just compensation for a taking under state law, it might become unnecessary to address Old Vail's

federal takings claim. (*Sinclair Oil Corp. v. County of Santa Barbara*, *96 F.3d at 409.*) Even if adjudication of the state claim does not avert the need for adjudicating the federal constitutional issues, it is sufficient for *Pullman* purposes that it may narrow the federal constitutional questions. (*Pearl Inv. Co. v. City & County of San Francisco*, *774 F.2d at 1464.*)

Old Vail's state law issues are uncertain. (See, *Pearl Inv. Co. v. City & County of San Francisco*, *774 F.2d at 1465* [recognizing that uncertainty for purposes of Pullman abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law].) Old Vail's taking claim does not involve interpretation of an single legislative enactment. Instead, the taking claim involves the synergistic effects of the County of Riverside

specially assessing Old Vail's Property at a commercial rate while the City of Temecula down-zoned the Property from "Commercial" to "Office Professional" use; thereby destroying the Property's economic viability. The combined consequences of the County of Riverside and City of Temecula's actions involves an uncertain and uncharted area of state law warranting Pullman Abstention. (See, *Georgevich v. Strauss, 772 F.2d 1078, 1091 (3rd Cir. 1985)* ([recognizing that juxtaposition of otherwise clear statutes can create an independent ambiguity authorizing Pullman abstention].)

IV. Younger Abstention Is Improper.

The juristic purpose of Younger abstention is to prevent the utilization of the federal judicial system to either impede or obstruct a state's independent power of adjudication. (See, *Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct.*

1200 (1975); Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211 (1977); Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911 (1977); Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515 (1982); Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718 (1986); Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519, 48 U.S. 1 (1987).)

The U.S. Supreme Court has never explicitly sanctioned the employment of Younger abstention in those circumstances where: (1) the federal plaintiff and state plaintiff are identical; and (2) the federal action does not attempt to either restrain or prevent the state action.

The Sixth Circuit Court of Appeals has held *Younger* abstention to be inapplicable if: (1) the federal plaintiff and state plaintiff are

identical; and (2) the federal action does not attempt to forestall or circumvent the state action. (*Crawley v. Hamilton County Commissioners, 744 F.2d 28 (6th Cir. 1984).*)

In *Crawley*, jail inmates brought suit in federal and state court against county officials challenging the conditions of their confinement. The district court dismissed the inmates' action under *Younger* and the "judicial economy" doctrine enunciated in *Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976).* The inmates appealed.

The Sixth Circuit overruled the district court's employment of Younger abstention on the grounds that *Younger* is inapplicable where the federal plaintiffs are also the state plaintiffs and the federal action does not attempt to impair or impede the state action. (Id. 744 F.2d at 30.)

The Ninth Circuit has explicitly recognized the propriety of the *Crawley* holding limiting the applicability of *Younger* to those cases wherein a federal action is instituted to impede or impair a corollary state action. (*Fresh Int'l Corp. v. Agricultural Labor Relations Board*, *805 F.2d at 1360, fn. 8* [acknowledging the validity of *Crawley* but distinguishing *Fresh* on the grounds that the federal suit was not voluntarily filed by Plaintiff].)

Younger is inapposite to the instant case as Old Vail is both the state and federal plaintiff and the federal action does not attempt to contravene or undermine the correlative state action.

V. YOUNGER ABSTENTION FORECLOSES AN INVERSE CONDEMNATION LITIGANT'S ACCESS TO THE FEDERAL COURTS.

Considerations of judicial economy and federalism justifiably require a

federal court to exercise restraint in deciding whether to adjudicate a civil rights action when a civil suit concerning the same basic dispute is pending in state court. Nevertheless, those considerations are not compelling enough to justify the complete subversion of the federal courts' role as the primary vindicators of federal civil rights, much less to motivate the virtual abdication of the federal courts' statutory responsibility in civil rights cases.

In approaching civil comity cases, federal courts must exercise considerable discretion in defending the federal rights of the litigants without unduly infringing upon the judicial sovereignty of the independent states. The Pullman doctrine represents the most utilitarian approach to resolving the conflicts of comity raised by inverse condemnation litigants pursuing distinct

constitutional rights in separate forums. Under Pullman abstention, the federal court respects the state's right to decide those issues pertinent to its internal affairs by reserving its jurisdiction pending a final determination of those claims raised in the state court proceedings. The federal court further minimizes conflicts of comity by having the federal issues obviated or, at least, narrowed by the state court proceedings. Finally, Pullman abstention guards the federal rights of the inverse condemnation litigant by preserving his right to a federal forum for adjudication of his federal claims.

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CONCLUSION

Old Vail requests the Court to grant this petition for certiorari.

Dated: July 2, 1997

DETISCH & CHRISTENSEN

By: _____
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Attorneys for Petitioner

APPENDIX A

Filed 03-10-97

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

OLD VAIL PARTNERS,	No. 96-55238
Plaintiff-Appellant,	D.C. No. CV-94-06309-CBM
v.	
COUNTY OF RIVERSIDE; CITY OF TEMECULA,	
Defendants-Appellees.	ORDER

Before: **BEEZER** and **KOZINSKI**, Circuit Judges, and **SHUBB***, District Judge.

Appellant's petition for rehearing is **DENIED**.

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* The Honorable William B. Schubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX B

Filed 02-10-97

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

OLD VAIL PARTNERS,	No. 96-55238
Plaintiff-Appellant,	D.C. No. CV-94-06309-CBM
v.	
COUNTY OF RIVERSIDE; CITY OF TEMECULA,	
Defendants-Appellees.	MEMORANDUM

Appeal from the United States District Court for the Central District of California Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted February 3, 1997
Pasadena, California

Before: **BEEZER** and **KOZINSKI**, Circuit Judges, and **SHUBB****, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the court of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable William B. Schubb, Chief United States District Judge for the Eastern District of California, sitting by designation.

In addition to this federal action, appellant is pursuing identical claims against defendants in California state court. Because we are bound by "a strong federal policy against federal-court interference with pending state judicial proceedings," Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359, 360 (9th Cir.) 1993) (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)), cert. denied, 510 U.S. 1110 (1994), appellant's complaint must be dismissed. [1]/

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[1]/ The district court concluded that it was barred by the Tax Injunction Act, 28 U.S.C. §1341. Because resolving the case on abstention grounds is considerably easier than deciding this question, and because it will not affect the outcome of the case, we assume that we have subject matter jurisdiction. See United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

Younger abstention is appropriate where "(1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986). Each of these criteria is met: Appellant's parallel state action was filed on the same day as the federal complaint and is currently on appeal, see id. at 1358; "land use planning is a sensitive area of social policy," Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996), that implicates "substantial" state interests, Mission Oaks, 989 F.2d at 361; and California state courts afford appellant "an adequate opportunity" to raise federal takings claims. Id.

Although the district court dismissed appellant's complaint without prejudice to the state court action, its dismissal on jurisdictional grounds will preclude appellants from returning to federal court. Because Younger abstention requires dismissal without prejudice, Beltran v. California, 871 F.2d 777, 782-83 (9th Cir. 1989), the district court's opinion is **VACATED**, and the case is **REMANDED** with instructions to dismiss on Younger ground. Each side shall bear its own costs.

APPENDIX C

Filed 01-10-96

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLD VAIL PARTNERS, Plaintiff, v. COUNTY OF RIVERSIDE, et al. Defendants.	)	No. CV 94-6309 CBM ORDER RE: MOTION FOR RECONSIDERATION

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Old Vail Partners, a California general partnership, purchased property (the "Property") within the boundaries of defendant Riverside County (the "County"). Prior to Old Vail's purchase of the property, the County had created Assessment District 159 ("AD 159") in which the property lies. Old Vail alleges that the County assessed the

property based on contemplated commercial zoning, i.e. on the assumption that the Property would ultimately be put to commercial use.

Ten days after Old Vail purchased the Property, the City of Temecula (the "City") annexed certain property within AD 159, including the property purchased by Old Vail. Four years later, the City adopted a general plan providing that the Property would be in an area designated for "professional office" use.

Old Vail then filed two lawsuits against the City and the County. One was filed in Riverside County Superior Court, Case No. 253-598, and the other, now pending here, was filed in the Southern District of California. Both suits were virtually identical and sought damages

for inverse condemnation[1] and conspiracy to violate plaintiff's federal civil rights, declaratory relief that the general plan was unjust and invalid, and an injunction prohibiting the City and County from collecting the assessment while enforcing the zoning restrictions and requiring that the City reform its general plan.[2]

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[1] Old Vail seeks damages against the County only, not against the City, for inverse condemnation.

[2] Old Vail's state court action against the County of Riverside for inverse condemnation was dismissed, with prejudice, on August 25, 1995. Old Vail's state court action against the County of Riverside, the City of Temecula and Albert Webb Associates was dismissed,

The County, joined by the City, filed a motion to dismiss. This Court granted those motions, concluding that the Tax Injunction Act bars this Court's jurisdiction of plaintiff's action. The Court also found that Plaintiff's claims under Section 1983 and for inverse condemnation did not resurrect the Court's jurisdiction because 1.) the Act bars those claims as well and 2.) plaintiff failed to state a claim in those causes of action upon which relief could have been granted.

Old Vail moved for reconsideration of the court's order on November 18, 1994. Recently, it was brought to this Court's attention that no order has issued with respect to said motion for

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with prejudice, on November 6, 1995.

reconsideration.[3] This present Order takes into consideration the parties' most recent arguments and evidence with regard to Old Vail's November 18, 1994 motion.

II. OLD VAIL FAILS TO MEET THE STANDARDS FOR RECONSIDERATION

Under Local Rule 7.16, a party may move for reconsideration of a decision "only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of

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[3] Defendant County of Riverside filed an additional motion on November 13, 1995, requesting this Court to issue a ruling on Old Vail's November 18, 1994 Motion for Reconsideration. Plaintiff filed an opposition to this recent motion on November 27, 1995.

reasonable diligence could not have been known . . . at the time of such decision, or (b) the emergence of such new material facts or a change of law occurring after the time of such decision or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." The moving party may not merely repeat or reargue its unsuccessful motion or opposition.

In this motion, Old Vail does exactly what is prohibited: it reargues its prior motion and relies upon evidence available to it prior to the Court's decision. Accordingly, Old Vail has neither met the standards necessary to succeed on a motion for reconsideration nor persuasively argued that the Court's decision was incorrect.

A. Old Vail's Attempt to Re-Characterize Its Complaint Does Not Save This Court's Jurisdiction

Old Vail claims that its complaint does not contest state authority to assess property or to tax but simply challenges the dual effects of the County and the City's actions. According to Old Vail, if its action is successful, there would be no more than a tangential effect on the state's revenue-gathering function. Old Vail also claims that its complaint is really a request for a refund for a de-facto downzoning. Based upon these characterizations of its actions, Old Vail argues that the Tax Injunction Act does not deprive this Court of jurisdiction.

Contrary to Old Vail's apparent belief, the Court considered these two

constructions of Plaintiff's complaint when making the decision set forth in its Order. Neither these constructions nor any of the out-of-state district court cases cited by Old Vail in support of its motion provide sufficient grounds for reconsideration.

B. Furey v. City of Sacramento Does Not Save This Court's Jurisdiction

Old Vail also argues that Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986), is controlling. In support of this argument, Old Vail merely reargues the points it raised in opposition to Defendants' motions to dismiss. Those points do not demonstrate any facts which the Court failed to consider. Moreover, those arguments were unpersuasive before and remain unpersuasive now for the reasons set

forth in the Court's Order.

C. Defendants Met The Standards For Dismissal Under Rule 12(b)(6)

Old Vail argues that dismissal under Rule 12(b)(6) was improper in this case because such motions are disfavored, rarely granted and proper only in "extraordinary cases." In deciding a motion to dismiss, the Court is required to accept the factual allegations of the complaint as true but is not required to accept as true merely conclusory allegations. Contrary to Old Vail's understanding of the law, dismissal is proper when, given the allegations in the complaint, the plaintiff will be unable to prove any set of facts upon which it could prevail. For the reasons set forth in the Court's Order of Dismissal, such is the case here.

D. The Dismissal of Plaintiff's State Court Action Does Not Save Its Claim For Inverse Condemnation and Deprivation of Civil Rights

Plaintiff's causes of action for inverse condemnation and for conspiracy for deprivation of civil rights under Section 1983 are both based upon an alleged taking in violation of the Fifth Amendment to the U.S. Constitution.[4] To constitute a violation of the Fifth

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[4] Plaintiff also bases its inverse condemnation claim on the Fifth Amendment to the California Constitution. The analysis under both is the same. Moreover, that claim does not provide a basis for federal jurisdiction so independent discussion of that issue is not necessary.

Amendment, the taking must be without just compensation. Therefore, plaintiff cannot bring either an action for inverse condemnation or a civil rights action for violation of the Fifth Amendment's takings clause without first unsuccessfully attempting to obtain just compensation through the procedures provided by the State. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. 3108 (1985).

In its November 27, 1995 opposition papers, Plaintiff announces the fact that its state court action has been dismissed, with prejudice. Without deciding whether or not this new fact constitutes a sufficient attempt to obtain just compensation through state procedures, the Tax Injunction Act bars

this Court's jurisdiction over this matter. Thus, Plaintiff's inverse condemnation and deprivation of civil rights claims are properly dismissed.

E. Old Vail's Recycled Arguments Are Improper

Old Vail also attempts to reargue the law on the requisite elements for a takings claim. Those arguments were appropriate for inclusion in its opposition to Defendants' motion. Under Local Rule 7.16, however, such reargument may not be included in a motion for reconsideration.

III. CONCLUSION

The Court DENIES Old Vail's Motion for Reconsideration.

IT IS SO ORDERED.

Dated: 1/10/96

Consuelo B. Marshall
United States
District Judge

APPENDIX D

Filed 11-08-94
Entered 11-09-94

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLD VAIL PARTNERS, Plaintiff, v. COUNTY OF RIVERSIDE, et al. Defendants.	)	No. CV 94-6309 CBM ORDER OF DISMISSAL

This matter is before the Court on defendants' motions to dismiss. The Court, the Honorable Consuelo B. Marshall presiding, reviewed the papers filed by counsel and set the matter for argument on October 31, 1994. Counsel for both parties appeared and submitted the matter to the Court on the papers filed. The Court ruled from the bench and now issues the following substantive Order granting defendants' motion to dismiss.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff Old Vail Partners, a California general partnership, purchased property (the "Property") within the boundaries of defendant Riverside County (the "County"). Prior to Old Vail's purchase of the property, the County had created Assessment District 159 ("AD 159") in which the property lies. Old Vail alleges that the County assessed the property based on contemplated commercial zoning, i.e. on the assumption that the Property would ultimately be put to commercial use.

Ten days after Old Vail purchased the Property, the City of Temecula (the "City") annexed certain property within AD 159, including the property purchased by Old Vail. Four years later, the City adopted a general plan providing that the

Property would be in an area designated for "professional office" use.

Old Vail then filed two lawsuits against the City and the County. One was filed in Riverside County Superior Court, Case No. 253-598, and the other, now pending here, was filed in the Southern District of California. Both suits were virtually identical and sought damages for inverse condemnation[1] and conspiracy to violate plaintiff's federal civil rights, declaratory relief that the general plan was unjust and invalid, and an injunction prohibiting the City and County from collecting the assessment while enforcing the zoning restrictions

[1] Old Vail seeks damages against the County only, not against the City, for inverse condemnation.

and requiring that the City reform its general plan.[2]

The County, joined by the City, filed this motion to dismiss. First, defendants move under Federal Rule of Civil Procedure 12(b)(1) contending that the Court's jurisdiction is barred by the Tax Injunction Act. Second, defendants contend that plaintiff fails to state a claim under Rule 12(b)(6) because both its inverse condemnation claim and its civil rights claims lack any allegations

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[2] Old Vail's state court action against the County of Riverside for inverse condemnation was dismissed, with prejudice, on August 25, 1995. Old Vail's state court action against the County of Riverside, the City of Temecula and Albert Webb Associates was dismissed, with prejudice, on November 6, 1995.

that Old Vail attempted to receive just compensation.

II. THE TAX INJUNCTION ACT OF 1937 BARS THIS COURT'S JURISDICTION

Each of plaintiff's causes of action in this case seeks relief in one form or another from the conjunctive imposition of the County's assessment and the City's zoning. As such, plaintiff's complaint is best characterized as an attempt to interfere with the local government's fiscal affairs.

Under the Tax Injunction Act of 1937 (the "Act"),

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in

the courts of such state.

28 U.S.C. §1341. Congress enacted the Act because of the "imperative need of a State to administer its own fiscal operations." Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). The Act bars the federal court's jurisdiction of suits which would interfere with those fiscal operations so long as an adequate procedure exists in State court for those wishing to challenge the fiscal agenda. Rosewell v. LaSalle National Bank, 450 U.S. 503, 512, reh'g denied, 451 U.S. 1011 (1981). The Act applies to local taxes as well as State taxes, 17 Wright, Miller & Cooper, Federal Practice & Procedure, §4237, at 643-44 (2 ed. 1988), and should be construed broadly. Dillon v. State of Montana, 634 F.2d 463, 464-65 (9th Cir. 1980).

Plaintiff's complaint falls squarely within the ambit of the Act. Through its complaint, Plaintiff seeks to interfere with the local government's fiscal affairs. Although not labelled as such under California law, the assessment plaintiff seeks to eradicate is a tax defined under the Act. See Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371, 374 (3rd Cir. 1978) (tax under the Act determined by federal law, not state labels, in accordance with the policies of the Act); see, e.g., Alnoa G. Corp. v. City of Houston, 563 F.2d 769 (5th Cir.), cert. denied, 435 U.S. 970 (1978) (under the Act, street improvement assessments constitute "tax"). As evidenced by plaintiff's action in Riverside County Superior Court, the State courts provide

plaintiff with an adequate remedy which plaintiff has already chosen to pursue. Accordingly, plaintiff's claim for injunctive relief is barred by the Tax Injunction Act of 1937.

III. PLAINTIFF'S OTHER CAUSES OF ACTION ARE ALSO BARRED BY THE TAX INJUNCTION ACT

Plaintiff does not deny the applicability of the Act to its claim for injunctive relief but rather argues that jurisdiction is proper based upon its claim under Sections 1983 and 1985 and the principles of pendent jurisdiction. Each of the plaintiff's causes of action, however, including its claim under Sections 1983 and 1985, arises from the same conduct and involves an attempt to "enjoin, suspend or restrain the assessment, levy or collection of" a tax.

Dillon, 634 F.2d at 454-65 (Section 1983 claim seeking refund of state taxes barred by the Act). Accordingly, the broad jurisdictional bar of the Tax Injunction Act bars this Court's jurisdiction of plaintiff's action even though some of its causes of action seek damages for imposition of the assessment rather than simply an injunction. Id.

Plaintiff argues that Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986), implicitly refutes defendants' argument concerning the broad applicability of the Act to all of its claims. In Furey, the owner of agriculturally zoned land brought an inverse condemnation claim to recover the cost of sewer improvements for which he had previously been assessed but which were rendered useless when his land was

re-zoned as open space. In that case, the Court made no mention of any bar to its jurisdiction under the Tax Injunction Act. Plaintiff argues that the absence of any discussion of the Act implies that the Act's jurisdictional bar is clearly inapplicable. Plaintiff fails to mention, however, that the Furey court had explicitly noted that the plaintiff had exhausted his state procedures and therefore had no adequate state remedy remaining. Id. at 1450, n.1. Moreover, Furey did not involve a tax imposed by the government but rather an assessment requested by the property owners, including the plaintiff, in order to pay for improvements to their property. Id. at 1454. No one appeared to argue that the assessment was a tax. Because the assessment was imposed at the request of

the landowners themselves, the court held that it did not constitute a taking. Id. at 1454-57. Because of these factual distinctions, Furey does not undermine the Act's jurisdictional bar in this situation and plaintiff's argument fails.

IV. PLAINTIFF'S INVERSE CONDEMNATION CLAIM AND SECTION 1983 CLAIM FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Even if the Act did not bar this Court's jurisdiction of plaintiff's Section 1983 claim, plaintiff's complaint fails to state a claim under that Section upon which relief may be granted. In opposition to defendants' motion on this ground, plaintiff provides a cursory review of the standards for dismissal under Rule 12(b)(6), but does not address the specific points argued by the

defendants concerning the sufficiency of plaintiff's allegations. A review of plaintiff's allegations and the applicable case law indicates that plaintiff's allegations are insufficient.

A. Plaintiff Has Not Adequately Alleged A Taking Without Just Compensation In Violation of the Fifth Amendment

Plaintiff's causes of action for inverse condemnation and for conspiracy for deprivation of civil rights under Section 1983 are both based upon an alleged taking in violation of the Fifth Amendment to the U.S. Constitution.[3] To

[3] Plaintiff also bases its inverse condemnation claim on the Fifth Amendment to the California Constitution. The analysis under both is the same. Moreover, that claim does not provide a basis for federal jurisdiction so

constitute a violation of the Fifth Amendment, the taking must be without just compensation. Therefore, plaintiff cannot bring either an action for inverse condemnation or a civil rights action for violation of the Fifth Amendment's takings clause without first unsuccessfully attempting to obtain just compensation through the procedures provided by the State for obtaining such compensation. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 105 S.Ct. 3108 (1985).

In its complaint, plaintiff alleges that in compliance with California Government Code §§910 and 945.4, it filed and served on the defendants complaints

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independent discussion of that issue is not necessary.

alleging virtually the same facts as those set forth in this action and seeking that they either amend the City's general plan or recalculate the County's assessments.[4] Plaintiff also alleges that it served upon the County a written request to assess the Property. Plaintiff alleges that it has not received responses to either its complaints or its written request but admits that the deadline for response has not yet passed. Since plaintiff has not alleged (and, by its own admission, cannot allege) that it has attempted to obtain just compensation, its inverse condemnation claim and its Section 1983

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[4] It appears that these complaints are not the same as that filed by plaintiff against the defendants in Riverside Superior Court.

claim based upon a Fifth Amendment violation is dismissed.

V. CONCLUSION

The Tax Injunction Act bars this Court's jurisdiction of all of the causes of action in plaintiff's complaint. Plaintiff's claims under Section 1983 and for inverse condemnation do not resurrect the Court's jurisdiction because the Act bars those claims as well and because plaintiff fails to state a claim in those causes of action upon which relief can be granted. Therefore, this action is dismissed without prejudice to plaintiff's filing it in state court but is not given leave to amend to attempt to provide this Court with jurisdiction.

Dated: 11/7/94

CONSUELO B. MARSHALL
UNITED STATES
DISTRICT COURT